Supreme Court, U.S.
FILED

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No. 03-12

In the

Supreme Court of the United States

WILLIAM A.. KENT,

Petitioner,

v.

BANK OF AMERICA. et al. N. A..,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

DID CONGRESS IN ENACTING 12 USC § 85 INTEND WHEN IT SAID "THE LAWS OF THE STATE" ONLY THE NUMERICAL LAW OF THE STATE OR THE ENTIRE BODY OF LAW OF THE STATE AND WAS THE COURT BELOW IN ERROR IN NOT FOLLOWING CITIZENS' NATIONAL BANK v. DONNELL, 195 US 369 (1904) WHICH SO HELD?

LIST OF PARTIES

The parties to the proceedings below were Petitioners WILLIAM A. KENT and GABRIELA PROKISOVA, and Respondent was BANK OF AMERICA, N.A. All parties are before this Court.

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PETITION FOR WRIT OF CERITORARI

Petitioners WILLIAM A. KENT and GABRIELA PROKISOVA respectfully pray that a Writ of Certiorari issue to review the judgment of the California Court of Appeals for the Fourth Second Appellate District entered on February 11, 2003, discretionary Writ of Review Denied by the California Supreme Court on May 21, 2003.

OPINIONS BELOW

A. California Supreme Court.

The California Supreme Court issued an order dated, May 21, 2003, denying discretionary review, by denying a petition for a writ of review to review the decision of the Court of Appeals for the Fourth Appellate District, dated, February 11, 2003. These decisions are unpublished.

The order of the California Supreme Court dated May 21, 2003, is reproduced in the Appendix at page App.1.

The Opinion and Order of the Court of Appeal for the Second Appellate District dated February 11, 2003, is reproduced in the Appendix hereto at page App. 2.

JURISDICTION

This petition for certiorari is filed within 90 days from the date of the denial of discretionary review by the California Supreme Court in accordance with

Supreme Court Rule 13(1). The Court's jurisdiction arises pursuant to Title, 28 U.S.C., Section 1257(3).

STATUTES INVOLVED

This action is based upon 12 U.S.C. Sec. 85. The applicable provision states in part:

"85. Rate of interest on loans, discounts and purchases.

> Any association may ...charge on any loan ...interest allowed at the rate allowed by the laws of the State...where the bank is located..., and no more, except hat where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

STATEMENT OF THE CASE

1. Facts and Background. The complaint was filed on January 3, 2001, in the Superior Court of the State of California County of Orange as a class action, challenging the late fees and overlimit fees charged by Bank of America N.A. ("BofA"). The gist of the complaint was that the Bank of America N.A. charged a $29.00 late fee for a $10.00 installment payment when the payment was only one day late (a 109,000% interest rate when annualized) which was unconscionable, in violation of the covenant of good faith and fair dealing, contrary to the reasonable expectations of the parties, represented an unreasonable provision in an adhesion

contract, etc. under the laws of the state of Arizona, the home state for BofA.

BofA also charged a $29.00 overlimit fee where the overlimit amount was only $10.00.This was also outrageous.

After the second amended complaint was filed, discovery had, a motion was made by BofA for summary judgment which was granted by the trial court. An appeal was taken to the Court of Appeals for the Fourth Appellate District, Santa Ana Division, of the State of California. The appellate court affirmed the summary judgment for BofA. A petition for a writ of review to the California Supreme Court was denied by that court and this petition is now made to this Court to raise very important and far-reaching issues for the national banking industry and the national associations of this country.

Phoenix, Arizona, is the headquarters and the home state of BofA as set forth in BofA's certificate with the United States Comptroller of the Currency. Arizona has an enabling rate law, Ariz Rev State (2001) § 44-1205 (C), which states, in part: "Under a credit card revolving account... interest not to exceed the maximum rate set by contract may be charged...." **The state court held that that was the only law of the state of Arizona which can be used in judging the validity or lawfulness of the rates or fees charged by BofA.** It disallowed such state statutes as **ARS § 47-2302**, which disallows unconscionable provisions. It disallowed Petitioners' right to use the adhesion defense or the Arizona Usury law which Arizona adopted by incorporation into law Restatement, Second, Conflicts of Law § 203, other Arizona laws, such as, rules concerning good faith and fair dealing, reasonable

expectations of the parties, unreasonable provisions in adhesion contracts. Petitioners were precluded from using these defenses. The Court of Appeal would not even allow Petitioners to attack the enabling law of ARS § 44-1205(C), by arguing that it was unconstitutional under the Arizona Constitution (prohibition against local or special rates of interest). The Court of Appeal has ruled that Petitioners simply could not resort to any other laws of the state of Arizona beside the numerical law all of which was in violation of 12 U.S.C. § 85, which, indeed, does allow resort to all the laws of the state of Arizona. The state Court of Appeals ruled that the only checks and balances would be the vagaries of the competitive market conditions. But a law cannot mean one thing one day and another thing another day, depending upon the vicissitudes of the market. That cannot be how a law is to interpreted!

REASONS FOR GRANTING THE WRIT

Petitioners contend that they have a right under federal law, especially under the Citizens' decision, to attack the late fees and overlimit charges by using the entire body of law of the state of Arizona which places parameters on how much a state bank may charge its consumers and, therefore, by extension, how much natibnal banks can charge. Moreover, it is conceded and admitted that the BofA contract provides that the "law of Arizona" as well as "federal law" govern the contract rights of the parties. Certainly, a national bank can agree that all the laws of the state of Arizona can be used and apply in addition to federal law, as it did here. That clearly means that Petitioners should have a choice to use whatever laws it wants to use, either in the federal law or in any of the laws of the state of Arizona. When a litigant is given the right to use the laws of two

jurisdictions, that means that the litigant has a right to use any law which is contained and present in either body of law, not simply in federal law alone. The total laws of each jurisdiction apply and can be used in all respects, not just one law. Furthermore, Petitioners should have been allowed to attack the enabling law relied upon so heavily by BofA, to wit, ARS § 44-1205(C), as being unconstitutional under the Arizona Constitution. All of this was denied to the Petitioners in the name of federal pre-emption or federal supersession.

This case involves the interpretation of a 140-year old statute, 12 USC § 85, which is part of the National Bank Act, which prescribes that the "interest rates" for national banks shall be governed by "the laws of the state... where the bank is located."

The Court of Appeal for the Fourth Appellate District of the State of California ("Court of Appeal"), sua sponte, erroneously, creatively interpreted Section 85 to mean only those laws which are "material to the determination of late payment and overlimit fees." (P.4) (See also Page 7)

The Court of Appeal did not explain what it meant by "material to the determination" of the interest rate. For certain, there is nothing in Section 85 which reads that way. This is additional language injected into federal law by the state Court of Appeal! The Court of Appeal also held that Petitioners could conceivably use other laws of the state of Arizona "interpreting the state's limitation of usury." (Page 7) and also other "laws that 'pertain to the manner in which the numerical rate is calculated.' " All of this was one of the court's creative additions to the 1864 federal law. The court likewise did not explain further what it meant by "usury" laws or "laws that pertain to the manner in which the numerical

rate is calculated." More importantly, there is no decision, state or federal, which makes that qualification or creative interpretation over the 140-year period. The Court of Appeal then went on, expectedly, to state that in this case there were no such other laws in this case.

The Court of Appeal then held that since there are no such laws in the state of Arizona which fitted those definitions, the case must be dismissed. "As stated above, in Arizona there is only one relevant statute-section 44-1205." (Page 7) "... the Arizona Legislature has authorized banks to collect whatever late payments charges and overlimit fees **it desires.**" (Italics added.) (Page 4) [Might not the Arizona Legislature have thought that its unconscionability statute, §44-2302, could serve as a check and balance to this carte blanche authority contained in 44-1205(C), and that was the rationale behind the carte blanche authority? How can this be determined without a trial and hearing of the issues?]

Petitioners strenuously take exception to the Dickensian type of narrow or truncated definitions given by the Court of Appeals as having no foundation in federal law, nor in precedent, nor in supporting authority. None is cited in its opinion nor by BofA.

Petitioners cited a number of laws of the state of Arizona which might lend themselves to this further "check-and-balance" scenario.

Petitioners cited:

(1) the Arizona statute dealing with "unconscionability."[1] (2) the Arizona

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[1] ARS §§ 47-2302(B) and 47-2719. Broemmer v.Abortion Serv of Phoenix (1992) 173 Ariz 148, 840 P. 2d 1013, 1016; Maxwell v.

law dealing with "good faith and fair and dealing."[2] (3) the Arizona law dealing with Restatement of the Law of conflicts, 2nd Edition, Section 203, described as a "usury" where another state is involved. The criterion there is whether the Arizona rate is "greatly in excess" of the "other state's" rate;[3] (4) the Arizona law of adhesion contracts and the requirement that the provisions or terms be reasonable, [4] (5) a judicial standard of "reasonableness" in every contract, [5] (6) the Arizona Constitution which might find that the 44 ARS § 1205(C) was unconstitutional,[6] that is the Arizona law which authorized credit card banks to charge whatever their adhesion contract provides was

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Fidelity Financial Services, Inc. (1995) 184 Ariz. 82, 907 P.2d 51 (en banc).

[2] Wagenseller v. Scottsdale Me. Hosp. (1985) 147 Ariz. 370, 383, 701 P.2d 1025, 1038; Johnson International, Inc. v. City of Phoenix (1998) 192 Ariz. 466, 967 P.2d 607, 614; Enyant v. Trarrsamerica Ins. Co. (1998) 195 Ariz. 71, 985 P.2d 556, 561.

[3] Cardon v Cotton Lane Holdings (1992) 173 Ariz. 203, 814 P.2d 198, 207; Beckler v.State Farm Mut. Auto Ins. Co. (1999) 195 Ariz. 282, 987 P.2d 768, 772

[4] Broemmer v. Abortion Serv of Phoenix (1992) 173 Ariz. 148, 150-152; Phoenix Baptist Hosp. v. Aiken (1994) 170 Ariz. 289, 877 P.2d 1345, 1349; Huff v. Bekins Moving & Storage Co. (1985) 145 Ariz. 496, 702 P.2d 1341, 1343

[5] Gesina v. General Elec Co. (1988) 162 Ariz. 39, 45, 780 P.2d 1380, 1386; Chandler Med. Bldg. v. Chandler Dental (1993) 175 Ariz. 273, 277, 855 P.2d 787, 291; Birth Hope Adoption Agency, Inc. v. Doe (1997) 190 Ariz. 285, 947 P.2d 859, 863.

[6] E.g. Ariz Const., Art 19(10) prohibiting the passing local or special laws regulating the rate of interest; also, Art. 14, the due process clause.

> unconstitutional under Arizona law; (7) the Arizona law as to the "reasonable expectations of the parties,[7] (8) the understanding of the parties.[8]

The Court of Appeal held that these laws proposed as defenses to the rates charged by Bank of America NA could not be used by Petitioners because they were "contract" laws and "contract" laws are not envisaged in the 1864 clause which reads "laws of the state ...where the bank is located." Page 4.

The Court of Appeal held that Section 203 of the Restatement of Conflicts of Law, adopted by the Arizona Supreme Court, cannot be used because it is a "choice of law" statute. (P.5) The Court of Appeal never responded to the claim that 44 ARS § 1204(C) may be unconstitutional under the Arizona Constitution.[9] Hence, the Court of Appeal affirmed the summary dismissal of the case and denied the Petitioners' Petition for Rehearing. The California Supreme court also denied review under its discretionary review authority.

What precedent and legal authority exists under this 140-year old law supports a different interpretation for "laws of the state... where the bank is located" as including the entire body of law of the home state. Citizens' National Bank v. Donnell, 195 US 369 (1904); First National Bank of Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975), to cite one of many such cases; 9 Corpus Juris Secudum, Banks and Banking, (2002) § 552.

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[7] Maxwell v. Fidelity Financial Services, Inc. (1995) 184 Arrz. 82, 907 P.2d 51 (en banc); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co. (1984) 140 Ariz. 383, 391-392, 682 P.2d 388.

[8] Darner Motor Sales (1984) 140 Ariz 383, 391-392, 682 P.2d 388,

[9] This was referred to oral argument and set forth in the petition for Rehearing.

The Court of Appeal claims that these authorities, in fact, support its creative and truncated interpretation of 12 USC § 85.

A reading of these cases demonstrates that the Court of Appeal is in grievous error in coming to that conclusion.

The Citizens'case involved a national bank in Missouri which sought to export its rate to Nebraska. However, the rate that it sought to export was not legal in Missouri because it violated another law of the state of Missouri against the compounding of interest twice in one year, although the total interest rate charged was not usurious, that is, not in violation of the usury law of Missouri. This Court did not proceed to qualify the law it used. It did not even hint at the qualifications superimposed upon the federal law by the Fourth Court of Appeal. The Citizens' case stands for the holding that all laws of the home state of Missouri are fair game to strike down any and all rates, fees and charges of national banks when they may clash with these other laws..

Despite the Fourth Appellate District's opinion, the Citizens' decision has come to mean, since 1904, in all the treatises and decisions following thereafter that "the entire body of law" [any law] of the home state may be used, or can be considered, in deciding whether the numerical law of the home state was violated.

Because the Court of Appeal misinterpreted federal law and also simple contract law which can and did incorporate all the laws of Arizona as part of the contract, Petitioners were denied their day in court and precluded from presenting certain evidence dealing with the laws of the state of Arizona, which Petitioners

should have been allowed to do in order to attack the late fees and overlimit fees charged by BofA.

This case presents a case of tremendous importance to the country, to the populace, to the consumer, considering how vital and ubiquitous credit cards are to this country, to this economy and to this society. What is the true interpretation to be given to the clause "the laws of the state. . . . where the bank is located" and what laws of the home state can be used or cannot used by credit card holders is a decision that only this Court can now make for the guidance of the whole country, the whole banking industry, the whole population of credit card users and the general economic welfare of the country.

If, after using these various Arizona laws, the rates and fees charged by BofA survive or are held proper, then the law has been served and that rate can be exported, as it were. What is egregious here is the fact that the Fourth Appellate District will not even allow the Petitioners to resort to these other laws in attacking the challenged fees and rates or to present their evidence on these issues.

Petitioners believe, and submit, that they should have been accorded the right to use the proffered laws they have cited or any other laws of the state of Arizona, which might affect the validity and integrity of the rates charged by BofA, and, therefore, were entitled to their day in court in the state court below.

Query, Do state credit card banks in the state of Arizona have to follow these other laws? Would a state bank which issues credit cards be able to claim that Section 203 of the Restatement of Conflicts of Law (Second) cannot be used against it? Would it also be

able to say to an Arizona court that the unconscionability statute cannot be used against it? Or that § 44-1205(C) cannot be attacked as unconstitutional under the Arizona Constitution, etc. This is the real test of whether Petitioners should have been disallowed from using these other laws in their quest for the truth and the reasonableness and validity of the late-payment fees and overlimit fees charged to them.

The fact that the state Court of Appeal sought not to publish its one-of-a-kind decision must have been based upon its hesitation as whether its interpretation of Section 85 was a correct interpretation of federal law, which it recognized involves so many people and so much money, and may be wrong.

Unless this Court acts to put to rest this uncertainty in the law as to the true meaning of the clause "the laws of the state... where the bank is located", pure chaos will reign throughout the land with each court making its own guess as to what that phrase or clause means. Moreover, with national banks becoming the Golden hordes of the new modern credit world, this case is timely and suitable for this Court's time and attention.

CONCLUSION

Wherefore, Petitioners pray that this Honorable Court will grant the writ and correct the injustices and errors created by the State Court of Appeal's decision.

Respectfully submitted,
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(Any footnotes trail the end of each document)

Court of Appeal, Fourth Appellate District,
Division Three - No. G030262
S114573

IN THE SUPREME COURT OF CALIFORNIA

En Banc

WILLIAM A.. KENT,
Plaintiff and Appellant,

v.

BANK OF AMERICA. et al. N. A..,
Defendants and Respondents.

May 21, 2003 Filed

Petition for review DENIED.

Chin, J., was recused and did not participate.

GEORGE
Chief Justice

G030262
(Super. Ct. No. 01CC00443)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

WILLIAM A. KENT et al.,
Plaintiffs and Appellants,

v.

BANK OF AMERICA N.A. et al.,
Defendants and Respondents.

February 11, 2003 Filed

OPINION

Appeal from a judgment of the Superior Court of Orange County, William F. McDonald, Judge. Affirmed.

William A. Kent; Law Offices of Federico Castelan Sayre and Federico Castelan Sayre for Plaintiffs and Appellants.

Morrison & Forester, H. Mark Mersel, Kerry L. Wallis and Arne D. Wagner for Defendants and Respondents.

Bank of America issues credit cards to customers nationwide. Its principal place of business is Arizona, where the city code permits a bank to charge whatever late payment and overlimit fees it desires. (Ariz. Rev. Stat. (2001) § 44-1205, subd. C.) Two customers, William A. Kent and Gabriella Prokisova (collectively referred to as Kent), believe Bank of America should not be allowed to charge its excessively high fees to

California credit card customers. Kent filed a class action against Bank of America N.A., Bank of America, N.A. (USA) and Bank of America Corporation (collectively the Bank). The trial court granted the Bank's motion for summary judgment, ruling that pursuant to the National Banking Act (12 USC § 12), the Bank could charge whatever fees were permitted by Arizona law. Thereafter, the court denied a motion to set aside the judgment and a request for a new trial. Kent has appealed, claiming the trial court's rulings were erroneous. Applying the de novo standard of review for the purely legal issues raised, we conclude the trial court's rulings must be affirmed.

I

This dispute arises out of a $29 late payment charge and $29 overlimit fee. Kent tell us that credit card usage "if unchecked . . , can have some devastating consequences." He points out that "credit card users can overextend credit card use . . . which can lead to personal economic disaster." He claims that "[w]hile responsible credit card use in particular and good personal credit management in general, are essential elements in utilizing one's available credit resources so as to avoid some of these financial credit pitfalls, many national banks like . . . Bank of America . . . do very little to curtail the problem and much to contribute to it by way of assessing exorbitant, excessive and usurious late payment fees and overlimit charges to its credit card customers." He concludes the excessive $29 fees violate California and federal law. We disagree.

CA Financial Code vs. The National Banking Act vs. AZ

Commerce Code California Financial Code section 4001, subdivision (a)(1)(A)-(C), sets limits on what fees a "supervised financial organization" (such as Bank of America) may impose, The maximum late payment charge is $15. (Fin. Code, § 4001, subd. (a)(1)(C).) Moreover, a bank may not charge more than $10 when a customer exceeds his or her credit limit. (Fin. Code § 4001, subd. (a)(3).) Clearly the Bank violated these code provisions by imposing $29 late payment and overlimit charges.

However, Bank of America is a national bank and therefore also governed by the federal National Banking Act (the Act). (12 USC § 12,) Section 85 of the Act provides a national bank may charge its borrowers "interest at the rate allowed by the laws of the State, . . where the bank is located." The term "interest" has been interpreted to include late payment and overlimit fees. (Smiley v. Citibank (South Dakota) N.A. (1996) 517 U.S. 735, 740 (Smiley).)

Thus, pursuant to section 85, a national bank may assess a uniform set of fees to all of its customers nationwide, based on the fees allowed by the bank's home state, even when the charges may be higher than what is permitted by a customer's home state. (Marquette National Bank of Minneapolis v. First of Omaha Service Corp. (1978) 439 U.S. 299 (Marquette).) In short, a national bank may "export" its home state's rates and fees to any other state where it does business. Any state law, such as California's Financial Code section 4001, designed to limit a national bank's ability to export the fees authorized by its home state is preempted by section 85. (Smiley, supra. 517 U.S. at pp. 749-744.) The Bank is limited only by the laws of its home state.

What charges are "allowed by the laws of the" Bank's Home State of Arizona?

The parties disagree on the scope of law that should be considered when determining what fees are legally allowed by Arizona. Kent asserts the courts must consider the "entire body of law" of the home state. He argues this "body of law" encompasses not only the code fixing the numeric rate, but also the Restatement of Conflicts of Law and general rules of contract law (regarding unconscionability, reasonableness, good faith and fair dealing, and contract formation). The Bank asserts the court need only consider the "body of law" interpreting the home state's limitation on usury. We conclude the Bank is correct; it is only subject to state laws material to the determination of late payment and overlimit fees.

Arizona has only one usury statute, which states: "If the contract provides, the issuer or holder of a credit card revolving account may charge and collect as interest and include in the balances of the account, in addition to or in lieu of interest on the unpaid balances of the account, any . . . [¶] . . . [¶] . . . late payment or delinquency charge [or] [¶] . . . [¶] [a]n overlimit charge." (Ariz. Rev. tat. § 44-1205, subd. C.) [1] The Bank's charges comply with the terms of this statute. Its credit card customer agreements specifically provide for $29 late payment and overlimit fees. Unlike California law, there is no limit on the amount of fees that may be charged. Arizona is a very bank-friendly state.

Kent suggests there may be triable issues of fact regarding whether the contract provision imposing the $29 fees might be deemed unconscionable, unreasonable or made in bad faith. He asserts the

general principles of contract lave must also be considered by the trial court. He is wrong.

We recognize section 44-1205 specifies the charges must be mentioned in a contract and a bank may not charge more than the fees specified in its contract with a customer. But the Arizona Legislature has authorized banks to collect whatever late payment charges and overlimit fees it desires. Under section 44-1205, there are simply no restrictions on the total charges the Bank can impose. Contrary to Kent's assertion, Arizona's contract law cannot be used to set "reasonable" limits on those charges. To do so would totally frustrate the Legislature's clear intent to set no boundaries. As aptly stated by the Bank, "It is fanciful to suppose that the Arizona legislature enacted . . . [section] 44-1205 (c) in order to entrap lenders - by inducing them to obey and rely on the statute, and then subject them to 'unconscionability' liability for doing so. Conduct specifically authorized by . . . [section] 44-1205 (c) therefore cannot be outlawed as unfair or unconscionable."

Equally meritless is Kent's assertion the Restatement Second of Conflict of Laws must be considered, He focuses on section 203 which provides, "The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury laws of the state of the otherwise applicable law under the rule of § 188." (Rest. 2d Conf. of Laws, § 203.) Kent argues that in applying this test the Arizona courts would choose California law to govern. He explains the Bank has a substantial relationship with California and its $29 fees are "greatly in excess" of the California fees provided

for under Financial Code section 4001. He concludes the Arizona courts, applying California law, would forbid the Bank from exporting the fees and interest otherwise permitted under section 44-1205.

In essence, Kent is suggesting that notwithstanding the Act's exportation doctrine, any state can enact a choice of law statute forbidding a bank from exporting its home state rates. Under this theory, national banks would potentially have to abide with 50 different rates and fees depending on in which state its customer resides. To accept this argument would defeat the very purpose of the Act.

"The National Bank Act was enacted to equalize the standing of national banks with their state-chartered competitors, and to prevent state legislatures from discriminating against national banks. [Citation.]" (Video Trax, Inc. v. Nationsbank, N.A. (S.D. Fla. 1998) 33 F.Supp.2d 1041, 1047.) As explained by the United States Supreme Court in Marquette, "Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system.' " (Marquette, supra, 439 U.S. at p. 314) The Act's provisions "have been interpreted for over a century to give 'advantages to National banks over a their State competitors.' [Citation.) 'National banks' . . . 'have been national favorites.' " Ibid, fn. omitted.)

Indeed, in Marquette, the court dismissed the petitioners' argument that the "'exportation' of interest rates . . . will significantly impair the ability of States to enact effective usury laws." (Marquette, supra, 439 U.S. at p. 318.) The court explained, "This impairment, however, has always been implicit in the structure of the National Bank Act . . . . [T]he

protection of state usury laws is the issue of legislative policy, and any plea to alter [section] 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." (Id. at pp. 318-319)

Nevertheless, Kent argues there is authority supporting his argument. He claims there are numerous federal cases holding the "entire body of law" of a bank's home state must be incorporated into section 85. He picks Citizens National Bank v. Donnell (1904) 195 .U.S. 369 as the "seminal" case. The case is instructive, but does not help Kent's crusade.

In Citizens National Bank, the bank's home state was Missouri. The court considered two Missouri statues: The first one capped interest rates at 8 percent and the other stated no bank could compound interest more than once a year. (Citizens National Bank v. Donnell, supra, 195 U.S. at p. 373.) The court determined that the national bank had compounded interest twice one year, but the effective rate was less than 8 percent. Nevertheless, the court concluded the rate was forfeited because the bank was only allowed to compound interest one time each year. (Id. at p. 374.) Kent argues this case supports his theory that section 85 incorporates more than a state's statute establishing the numeric rate.

True, in Citizens National Bank the court considered more than one code provision. What Kent fails to appreciate is that those two statues comprised the relevant usury law in Missouri. A national bank taking the state rate must consider not only the code provision setting the numerical rate, but must also take into account any laws that "pertain to the manner in which the numerical rate is calculated." (9 C.J.S. (2002) Banks and Banking, § 552.) Stated another way, section 85

incorporates the numerical rates established by the state as well as provisions "material" to the determination of those rates and fees. (Ibid., see also 12 C.F.R. § 7.4001 (2002).)

In all the authority cited by Kent, the courts considered only the state laws "interpreting the state's limitation on usury." (9 C.I.S., supra, Banks and Banking, § 552.) Those cases involved states having, more than one usury law. (e.g. Hass v. Pittsburgh National Bank (3d Cir. 1975) 526 F.2d 1083 [court considered law limiting interest rate and law specifying what balance interest is to be applied]; American Timber & Trad. Co. v. First Nat. Bank of Oregon (9th Cir. 1973) 511 F.2d 980 [court considered law limiting permissible interest rates and law setting time period over which per annum rates are to be calculated].) None of those courts looked to general contract law or choice of law provisions. Kent simply offers no authority, and we found none, holding section 85 incorporates a state's choice of law provisions. [2] To the contrary, all the authority supports the view a national bank is only subject to state laws "material to" the determination of late payment and overlimit fees. As stated above, in Arizona there is only one relevant statute - section 44-1205.

The United States Supreme Court held in Smiley and Marquette that a national bank has the right to charge any fees that are lawful in the bank's home state but are prohibited in the customer's home state. (See Marquette, supra, 439 U.S. 299.) Contrary to Kent's assertion, we do not believe this "imbues [the Bank] with an imperial mantle of invincibility" enabling it to lead all unsuspecting Americans to financial ruin. As noted by one treatise: "After the Smiley decision was handed down, industry insiders predicted little change in business practices because of the highly

competitive nature of the market for bank-issued credit cards. In order to maintain their market shares and in an effort to lure customers away from their competitors, credit card issuers have had to increase their advertising budgets as well as create innovative new products and services. To remain competitive, bank credit card issuers have also cut annual fees and interest rates."' (16 Ann. Rev. Banking L. 517, 544-545, fns. omitted.) Indeed, "The Smiley decision ultimately allows market forces to determine the most attractive package of terms in the bank-issued credit card market. If the fees of one card become too onerous, the consumer can just find another card." (Id. at p. 549.)

The judgment is affirmed. The Bank shall recover its costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.
RYLAARSDAM, J.

FOOTNOTES

[1] All further statutory references are to the Arizona Revised Statute unless otherwise indicated.

[2] We need only briefly address Kent's argument that the Bank "is bound by its own contract which states that Arizona law applies to all of [the Bank's] credit card transactions." The credit card agreement states it is to be "governed by applicable Arizona and Federal law." (Italics added.) For purposes of section 85, the applicable state law is limited to Arizona's usury law.